- ♦ **1(A)(3) "PUBLIC BODY": DEFINITION NOT MET BY COUNTY EXECUTIVE**
- ♦ **1(B)(3) MEETING: DETERMINED NOT TO BE A MEETING-BOARD MEMBERS' SEPARATE CONFERENCES WITH COUNTY EXECUTIVE**
- ♦ **1(C)(3) ADMINISTRATIVE FUNCTION: OUTSIDE EXCLUSIONS - FORMULATION OF RECOMMENDATIONS ON SIZE OF BUDGET**
- ♦ **1(D) ADVISORY FUNCTION: DELIBERATIONS ON BUDGET RECOMMENDATIONS**
- ♦ **7(G) TRAINING REQUIREMENT: WHEN TRAINING WAS ACTUALLY TAKEN WITHIN THE INITIAL DEADLINE, FAILURE TO DESIGNATE TRAINEE NOT A SUBSTANTIAL VIOLATION**

***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at** http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

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April 13, 2015

Re: Baltimore County Board of Education
Ann Miller, Complainant

Ann Miller, Complainant, alleges that the Board of Education of Baltimore County ("school board") violated the Open Meetings Act in two ways. First, she alleges, the members of the school board met privately with the county executive in small groups, none constituting a quorum, in order to circumvent the Act's requirement that the school board meet in the open. Second, she alleges, the school board did not comply with § 3-213, the section of the Act that requires public bodies to designate the name of an employee, officer, or member to receive training in the Act and send the person's name to us. The designee must then take the training.[1] Complainant also alleged that the

[1] Statutory references are to the General Provisions Article of the Maryland Code.

Baltimore County Executive violated the Act. As we will explain below, we have dismissed that allegation.

We begin with the training requirement, as the easiest issue. The school board timely designated its general counsel, a school system employee who attends all of its meetings, and she promptly completed the online course specified in the Act as one of the ways to fulfill the requirement. The school board did not send her name to us within the deadline set by § 3-213. Given the school board's timely compliance with the more important aspect of the provision—ensuring that an employee who attends its meetings is actually trained—we do not regard that omission as a substantial violation.

The more substantive issue is whether the conferences between the county executive and small groups of school board members were "meetings" subject to the Act's requirement that public bodies "meet" in public. *See* § 3-102, 3-105. If the conferences were not "meetings," the Act did not apply. In addressing the question, we have always applied the Act's definition of the verb "to meet," which is satisfied only when a quorum of its members is present. However, the Court of Appeals of Maryland has deemed a gathering of less than a quorum of members to be subject to the Act. As we explained in 8 *OMCB Opinions* 56 (2012), that happened when the gathering occurred as part of a practice referred to in other states as a "walking quorum." If the conferences were "meetings" by either route, then the school board would have violated the Act by failing to give public notice and invite the public to them. We will address each route.

The Act defines the verb "to meet" as "to convene a quorum of a public body to consider public business." § 3-101(g). Under the Act, a "quorum" is a majority of the members of a public body, or the "number of members that the law requires." § 3-101(k). The school board's handbook states: "A quorum consisting of a majority of the full Board must be present in order to convene a meeting." The school board's response states that the board comprises eleven appointed members and one student member. It is unclear from the response whether the student member's presence counts toward a quorum, but, for our purposes, the minimum number would be six. The response states that the county executive met with the board members in groups of one to three members, well short of a quorum. So, the members' conferences with the county executive were not "meetings" within the Act's definition.

Whether the conferences should be deemed to be subject to the Act poses a more difficult question, both factually and legally. We explained the "walking quorum" concept in 8 *OMCB Opinions* 56 and incorporate that explanation

here.[2] In short, courts from other states have used the term to describe small meetings through which some members, or even staff, circulate in such a way that a quorum is, in effect, deliberating together. Without using the term "walking quorum," the Maryland Court of Appeals has held that a city council violated the Act, even in the absence of an actual quorum, because members of the council were being cycled through the room for the express purpose of avoiding public discussion. *See Community and Labor United for Baltimore Charter Committee ("C.L.U.B.") v. Baltimore City Board of Elections*, 377 Md. 183 (2003). Although the Court neither explained its reasoning nor cited the out-of-state cases on the practice, the council president's testimony that she intended to exclude the public from the discussion was clearly central to the result. Another important fact was that a quorum of the council was sometimes in the room, and sometimes not, during the discussion, with the practical result that the group was in effect deliberating as a body even when the gathering fell one member short of a quorum. Here, we will look to the facts of the school board members' conferences with the county executive, as presented to us, for these two sets of circumstances.

As described in the school board's response, the conferences occurred during the time when the Board was considering whether to adopt the budget proposed by the superintendent. After the school board held a public hearing on the superintendent's proposed budget, but before the public work session that the school board had scheduled for discussion of the matter, the school board's office "received a telephone call from the County Executive's office, requesting meetings with Board members." In Baltimore County, the response explains, the county executive has the power to reduce or deny major categories of the budget. The meetings were "scheduled between the County Executive and the members of the Board, on dates and times that were convenient and available to the Board members." The meetings, attended by one to three members at a time, occurred "over about eight days." At the meetings, the response explains, "the County Executive explained to the Board members that the County would likely be unable to fund the Superintendent's proposed budget at the level set forth in the proposal." The response states, "There were no deliberations or discussions among the Board members, who mostly listened to what the County Executive had to say. Certainly no decisions were reached at the meetings." Complainant inferred otherwise; she states that the proposed budget that was introduced at the public work session had been reduced by eighteen million dollars, as reported in a Baltimore Sun article that she attached to the complaint.

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[2] Our opinions can be accessed online through the "Opinions" link at http://www.oag.state. md.us/Opengov/Open meetings/index.htm.

These circumstances differ from the facts in *C.L.U.B.*, which, it should be noted, were found after discovery and trial of the facts through the judicial process.[3] Here, we cannot conclude that the school board members wished to evade the Act; the county executive, not they, initiated the meetings, and a person would have to speculate to ascribe to the school board members any motive besides accommodating the county executive's request to speak with them. So, although the members acquiesced in the county executive's way of communicating with them, nothing before us suggests that they deliberately scheduled the meetings in such a way as to avoid deliberating among themselves in public. Likewise, we cannot conclude that members were cycled through the meetings to such an extent that the group, as a whole, was interacting on public business; nothing suggests that practice either.

Absent circumstances such as those noted by the Court of Appeals in *C.L.U.B.*, the Act does not make it illegal for members of a public body, when alone or with less than a quorum, to hear others' opinions on public business. What occurred here was not a violation of the Act, but instead a failure of awareness of the perception created by these conferences, held privately in a one-week period between two open meetings on the budget, at the request of an official with authority over the budget, and, seemingly unnecessarily, in small groups. Not surprisingly, these private conferences in the middle of a public process drew the attention of the press and the suspicion of members of the public.

We have two loose ends to tie up. First, the Complainant alleged also that the county executive violated the Act. The Act applies only to the conduct of a "public body," and, to be a "public body" under the Act, the entity must consist of "at least two individuals." § 3-101(h)(1)(i). The county executive, by himself, is thus not required to give notice of his separately-held conferences with other people. We therefore dismiss that allegation. Next, the school board asserts, by way of a back-up argument, that the members were performing an "administrative function" by hearing the county executive's view on budget constraints and that the conferences were thereby exempt from the Act under the Act's exclusion for that function. *See* § 3-103(a). On that, we simply caution that the application of the administrative function exclusion to discussions such

[3] The Compliance Board complaint mechanism is not analogous to a judicial or administrative proceeding in which a fact-finder may take testimony under oath, assess credibility and intent, and determine the rights of the parties. The Compliance Board was not set up to do any of those things; our process was designed instead to give members of the public a way to draw our attention to a public body's violations so that we can give the public body relatively fast guidance on how to comply with the Act. Fact-intensive questions such as intent are thus difficult for us to resolve.

as these is uncertain at best. Although earlier opinions have suggested that the preparation of particular line items in a budget might have been administrative, we have some doubt that consideration of the overall question of the size of the budget falls within the definition. More likely, that topic would fall instead within the advisory function, defined by the Act as the "making of recommendations . . . under a delegation of responsibility by . . . law." § 3-101(c).

In conclusion, we have not found that the school board violated the Act when its members met separately with the county executive in groups of three of less. We have dismissed the complaint as to the county executive and given advice on the administrative function exclusion.

Open Meetings Compliance Board

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